

Kevin Boyd, Sr. (“Boyd”) appeals from a jury conviction in the Superior Court of Lake County. He raises the following issues:

- I. Whether sufficient evidence supports his conviction of Class C felony intimidation based on the use of a deadly weapon where he was briefly armed with a BB gun; and,
- II. Whether the trial court improperly ordered two of his sentences to be served consecutively in violation of Indiana Code section 35-50-1-2.

Concluding that sufficient evidences supports Boyd’s conviction and that the trial court properly ordered consecutive sentences, we affirm.

Facts and Procedural History

On May 28, 2004, Boyd came home to the apartment he shared with his wife Christina Boyd (“Christina”) in Hammond, Indiana. The two argued about Christina’s decision not to prepare dinner. Later, while Christina watched television in the bedroom with a friend, Boyd entered the bedroom and began touching Christina. When she rebuffed his advances, Boyd stood up on the bed, grabbed Christina by the hair, and kneed her in the face. The friend attempted to call 911, but Boyd knocked the phone from her hand. He then left the apartment. As a result of this incident, Christina obtained a no contact order against Boyd.

On June 13, 2004, Christina awoke in the apartment to find Boyd grabbing her leg and demanding that they have sex. Boyd then grabbed her by the neck and told her that he would kill their daughter if she refused. Christina was afraid because “[Boyd] is not wrapped tight [] [a]nd [she] would see him doing something like that.” Tr. p. 104. She then complied with Boyd’s demands. The following morning, Christina went to the police, who arrested Boyd that afternoon for violating the no contact order.

Two months later, on August 11, 2004, Boyd returned to the apartment. He gave Christina a card and a flower and pleaded with her to allow him to return home. When she refused, Boyd demanded that she “get the [expletive deleted] out.” Tr. p. 132. As Christina proceeded to pack her clothing and that of her children, Boyd pushed her into the bathroom and demanded that they have sex. Christina initially refused, but eventually complied with Boyd’s demand.

When Boyd allowed her to leave the bathroom, Christina gave her cell phone to her daughter and instructed her to call 911, but the girl was unable to complete the call. Boyd then came out of the bathroom and kept the apartment’s cordless telephone with him to prevent Christina from calling police. A short time later, Boyd’s sister called. After speaking with her, Boyd handed the phone to Christina and went outside to get his things from his car. Christina ended the call with Boyd’s sister and called 911.

When the Hammond Police Officer Shaun Jorsch (“Officer Jorsch”) and Sergeant Michael Ramirez (“Sergeant Ramirez”) arrived, Christina informed them of the no contact order. Officer Jorsch accompanied Boyd into the bedroom, while Sergeant Ramirez spoke with Christina in the living area. Later, Sergeant Ramirez entered the bedroom and informed Boyd that he was under arrest for violating the no contact order. Boyd jumped up from the bed and ran to the bedroom’s closet. He reached into the closet, pulled out a gun, and pointed it at Sergeant Ramirez, saying, “I will kill you. I will kill you. Shoot me, shoot me.” Tr. p. 482.

As the officers backed out of the bedroom, Christina told them that the weapon was a BB gun. Sergeant Ramirez then tried to grab Boyd as he ran out the apartment.

Officer Jorsch attempted to taser Boyd, but missed. Sergeant Ramirez caught Boyd at the bottom of the stairs. As the two officers were attempting to subdue Boyd and take the gun from him, Boyd punched Officer Jorsch in the groin. The officers tasered Boyd twice more in order to subdue him. Boyd's gun was found to be a loaded BB gun.

The State initially charged Boyd with two counts of Class B felony rape, Class C felony intimidation, Class D felony intimidation, two counts of Class D felony resisting law enforcement, Class D felony battery, Class D felony confinement, Class B misdemeanor invasion of privacy, Class B felony criminal deviate conduct, Class D felony sexual battery, and Class D felony confinement. Appellant's App. p. 19-21. A jury trial commenced on May 9, 2005. The jury found Boyd guilty of Class C felony intimidation, Class D felony resisting law enforcement, Class A misdemeanor resisting law enforcement, Class A misdemeanor battery, Class D felony confinement, Class A misdemeanor invasion of privacy, and Class B misdemeanor battery. Appellant's App. p. 164.

The court conducted a sentencing hearing on July 20, 2005, and sentenced Boyd as follows: seven years for Class C felony intimidation, one year for Class A misdemeanor resisting law enforcement, two years for Class D felony resisting law enforcement, one year for Class A misdemeanor battery, and one year for Class D felony confinement, six months for Class A misdemeanor invasion of privacy, and six months for Class B misdemeanor battery. Appellant's App. p. 166-67. The court then ordered that the seven-year intimidation sentence be served consecutive to the two-year Class D felony resisting law enforcement conviction and to the six-month Class B misdemeanor

battery conviction. The remainder of Boyd's sentences were ordered to be served concurrently, for an aggregate sentence of nine and one-half years. Id. Boyd now appeals.

Discussion and Decision

I. Sufficiency

Boyd argues that insufficient evidence was presented to support his conviction of intimidation. In order to convict Boyd of intimidation as a Class C felony, the State was required to prove that he (1) communicated a threat; (2) to another person; (3) with the intent that the other person be placed in fear of retaliation for a prior lawful act; (4) while drawing or using a deadly weapon. Ind. Code § 35-45-2-1(b)(2) (2004).

First, Boyd argues that the evidence is insufficient to prove that he intended to place Sergeant Ramirez in fear of retaliation for any prior lawful act. Sergeant Ramirez testified that when he informed Boyd that he was under arrest, Boyd went to the bedroom closet, pulled out a BB gun, and threatened to kill him. Tr. pp. 458, 482. From this evidence, the jury could reasonably infer that Boyd threatened Sergeant Ramirez in retaliation for the prior lawful act of informing him that he was under arrest.

Next, Boyd contends that the evidence does not support his conviction of intimidation as a Class C felony because the BB gun was not a deadly weapon. Indiana Code section 35-41-1-8 defines "deadly weapon," in relevant part, as a loaded or unloaded firearm, or as a destructive device, weapon, device, taser, or electronic stun weapon, equipment, chemical substance, or other material that in the manner it is used, or could ordinarily be used, or is intended to be used, is readily capable of causing serious

bodily injury. Ind. Code § 35-41-1-8 (2004). “Serious bodily injury” is defined as “bodily injury that creates a substantial risk of death or that causes: (1) serious permanent disfigurement; (2) unconsciousness; (3) extreme pain; (4) permanent or protracted loss or impairment of the function of a bodily member or organ....” Ind. Code § 35-41-1-25 (2004).

Thus, the statute defines two categories of “deadly weapons:” (1) firearms; and (2) weapons capable of causing serious bodily injury. Mitchem v. State, 685 N.E.2d 671, 677-78 (Ind. 1997). Although not firearms, pellet or BB guns may be considered deadly weapons. Davis v. State, 835 N.E.2d 1102, 1112 (Ind. Ct. App. 2005), trans. denied (citing Merriweather v. State, 778 N.E.2d 449, 457 (Ind. Ct. App. 2002)). “Whether a weapon is a deadly weapon is determined from a description of the weapon, the manner of its use, and the circumstances of the case.” Id. The fact finder may look to whether the weapon had the actual ability to inflict serious injury under the facts and circumstances and whether the defendant had the apparent ability to seriously injure the victim through use of the object during the crime. Id.

Sergeant Ramirez testified that Boyd pointed what he believed to a handgun “right at my face” from a distance of “maybe seven feet.” Tr. pp. 493, 483. Under these circumstances, Sergeant Ramirez had to make a split-second identification of the gun and react accordingly. Moreover, Sergeant Ramirez testified that once he heard Christina claim that Boyd had a BB gun, he “wasn’t sure at that point. But whether it was a real weapon or an air gun, I know that either one can do damage...if not kill.” Tr. p. 492. He

testified that, under those circumstances, a BB could penetrate the skin, put out an eye, and enter the skull. Tr. p. 494.

From this testimony, the jury could reasonably conclude that Boyd had both the apparent and actual ability to seriously injure Sergeant Ramirez with the BB gun, and thus, that the BB gun was a deadly weapon within the meaning of the statute. Sufficient evidence supports Boyd's conviction of Class C felony intimidation.

II. Sentence

Boyd argues that the trial court improperly ordered his two-year sentence for Class A misdemeanor resisting law enforcement to be served consecutive to his seven-year sentence for Class C felony intimidation. He contends these sentences are required to be run concurrently, pursuant to Indiana Code section 35-50-1-2, because the offenses arose from a single episode of criminal conduct.

At the time of Boyd's offenses, Indiana Code section 35-50-1-2 provided that the total of the consecutive terms of imprisonment to which the defendant is sentenced for felony convictions arising out of a single episode of criminal conduct should not exceed the presumptive sentence for a felony which is one class of felony higher than the most serious of the felonies for which the person has been convicted. Ind. Code § 35-50-1-2(c) (2004).¹

¹ ¹ Between the date of Boyd's offenses, August 11, 2004, and the date of sentencing, July 20, 2005, Indiana Code section 35-50-2-6 was amended to provide for an "advisory" sentence rather than a presumptive sentence. See P.L. 71-2005, § 9 (eff. April 25, 2005). The amendment to section 35-50-2-6 constitutes a substantive change in a penal statute and may not be applied retroactively. Therefore, in this case, we are required to apply the prior "presumptive" sentencing scheme. See Weaver v. State, 845 N.E.2d 1066, 1071-72 (Ind. Ct. App. 2006), trans. denied. But see Samaniego-Hernandez v. State, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005).

Here, Boyd's most serious conviction is a Class C felony intimidation. The presumptive sentence for a felony one class higher, that is a Class B felony, is ten years. Ind. Code § 30-50-2-5 (2004). Thus, Boyd's aggregate sentence of nine and one-half years does not violate the consecutive sentencing limitation.

Conclusion

Sufficient evidence supports Boyd's conviction of Class C felony intimidation and the trial court properly ordered consecutive sentences.

FRIEDLANDER, J., and BARNES, concur.